

Meadow Valley Contractors, Inc. and International Union of Operating Engineers, Local 12, AFL-CIO. Cases 28-CA-15527-3, 28-CA-15726, and 28-CA-15775

July 19, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On March 8, 2000, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel and Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Nathan N. Albright and Benjamin Green, Esq., for the General Counsel.

Gregory E. Smith, Esq. (Smith & Kotchka) of Las Vegas, Nevada, for the Respondent.

David P. Koppelman, Esq., of Pasadena, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Las Vegas, Nevada, on September 30 and October 1, 1999. On December 18, 1998, International Union of Operating Engineers, Local 12, AFL-CIO (the Union) filed the original charge in Case 28-CA-15527-3 alleging that Meadow Valley Contractors, Inc. (the Respondent) committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The charge was amended on February 11 and March 17, 1999. The Union filed the charge in Case 28-CA-15726 on March 18, 1999. The original charge in Case 28-CA-15775 was filed by the Union on April 19, 1999. The Union amended its charge on May 6, 1999. On March 25, 1999, the Regional Director for Region 28 of the National Labor Relations Board issued a complaint and notice of hearing against the Respondent in Case 28-CA-15527-3 alleging that the Respondent violated Section 8(a)(1) and (3) of the Act. On June 25, the Acting Regional Director issued a consolidated amended complaint in all three cases. The Respondent filed timely answers to the complaints denying all wrongdoing.

¹ The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses,¹ and to file briefs. On the entire record, from my observation of the demeanor of the witnesses and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a Nevada corporation with an office and principal place of business in Phoenix, Arizona, where it has been engaged in heavy highway construction in Arizona, Nevada and New Mexico. During the 12 months prior to issuance of the complaint, Respondent purchased and received, in Nevada, goods and services valued in excess of \$50,000 from suppliers located outside the State of Nevada. Thus, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

The Respondent is a general contractor for highway construction in Arizona, Nevada, New Mexico, and Utah. This case concerns a job called the Beltway section 4 project in Henderson, Nevada (Beltway 4). The Beltway 4 job is a prevailing wage job. The wage determination is based on wages paid to union employees under local collective-bargaining agreements. The project manager for Respondent at the Beltway 4 project is Jae Johnson. In connection with this project, Respondent leased dirt crew equipment from a company called AnA Enterprises and hired certain AnA supervisors, including Jeff Anderson and Jay Simons to supervise dirt work on Beltway 4. Anderson became a superintendent of the dirt removal crew and Simons became a foreman.

Michael Riisager was hired by Simons for Respondent in August 1998. Simons hired Robert Irvine and Leonard Rollins in September 1998. In October 1998, Irvine was assigned to drive a water truck on the dirt removal crew. The General Counsel contends that Irvine was assigned this lower paying job because of his union activities and further that Irvine resigned in December 1998, because of this unlawfully motivated assignment.

Rollins was reassigned to drive a rock truck, a lower paying assignment, in November 1998. Again the General Counsel alleges that this assignment was based on Rollins' union activities. Further, the General Counsel contends that this assignment caused Rollins to resign his employment on January 8, 1999.

Riisager was laid off in April 1999. The General Counsel contends that Riisager was selected for layoff because of his union activities. Further, the General Counsel contends that

¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Respondent did not recall Riisager from layoff because of Riisager's union activities.

B. Facts

In August 1998, Jay Simons hired Michael Riisager to work on the Beltway 4 project. Riisager had previously worked for Simons on AnA jobs. Simons considered Riisager a good employee and a friend. Riisager was assigned to work as a bulldozer operator.

Robert Irvine learned of the Beltway 4 job from Riisager. Simons hired Irvine at the end of September 1998, and assigned him to a bulldozer. On October 20, the bulldozer that Irvine was operating broke down. On October 21, Irvine was assigned to drive the water truck, a lower paying job.

Leonard Rollins was hired by Simons at the end of September 1998. Rollins was assigned to drive a truck but requested that he be assigned to operate equipment. Until November 18, 1998, Rollins worked as a heavy equipment operator and grade checker but also drove a rock truck more than one third of his time on the job. On November 18, Rollins was permanently assigned to drive a rock truck. Rollins continued to drive a rock truck until he quit Respondent's employ on January 8, 1999.

The General Counsel offered evidence to show that Respondent knew of Irvine's union activities prior to his assignment to the water truck. Beginning with his hire, Irvine brought a lunchbox bearing a union insignia to work everyday. Also, during the period of September 28 to October 19, 1998, Irvine wore a baseball cap with a union insignia. Beginning October 19, Irvine believed that the Union had sent Respondent a letter designating Irvine as a union organizer. Thereafter, Irvine wore a union T-shirt almost every day. He also wore union pins on his baseball cap and a union sticker on his hard hat. However, the Union did not send the letter designating Irvine as a union organizer until November 9. Respondent received this letter on November 13.

Rollins testified that on or about October 20, Simons observed Irvine's lunchbox. Rollins claimed that Simons shook his head in a dissatisfied manner. On October 20, Irvine's bulldozer broke down and Simons sent Irvine home. The next day, Irvine was assigned to the water truck. Irvine performed this task well and continued on the water truck. In late November, Irvine was assigned to a larger water truck. Irvine testified that when supervisors gave him instructions they were close enough to observe his lunchbox and hat.²

The General Counsel contends that Respondent revealed its antiunion sentiment at a meeting held in November 1998. Respondent held a meeting for all Beltway 4 employees concerning the Union. After the meeting, Irvine said to Simons, "there's always two sides to every story." Simons told Irvine that the Union had been bad for him. Simons said the "Union could go straight to hell" as far as he was concerned. Irvine answered that he was on the Union B list and that the Union had been good for him. Simons replied that the Union hadn't done any good for him.

On November 9, the Union sent letters to Respondent naming Irvine and Rollins as "inside organizers." Respondent received the letter regarding Irvine on November 13 and the letter regarding Rollins on November 16, 1998. On November 16,

Rollins was working with a grade checker named Kelly Woods. Woods testified that on November 16, Simons asked Woods whether Rollins had talked to Woods about the Union. According to Woods, he answered that Rollins had not talked about the Union and Simons replied that Rollins had better not. Woods returned to work and told Rollins about the conversation. Simons denied this conversation. I credit Simons' testimony.

Woods also testified that in late November, Simons told him about the letters naming Irvine and Rollins as union organizers. According to Woods, Simons stated that an \$8-per-hour cut in pay would make things hard and force the employees to quit. Simons denied ever talking to Woods about these letters. Further, employee Heath Schlutter, the only other witness to this conversation, testified that he never heard Simons make such remarks. I note that, Irvine had been on the water truck since October and Rollins had been on the rock truck since November 18. I do not credit Woods' testimony. Rather I credit the testimony of Simons and Schlutter that Simons did not question Woods about the letters.

In mid-November, Simons approached Riisager while Riisager was working on a bulldozer. Simons asked Riisager whether the Union paid people to organize. Riisager answered that he believed the Union paid its organizers. In his testimony, Simons admitted that he probably asked Riisager whether union organizers were paid. However, he denied saying anything about reassigning anyone to a lower paying job. I credit Simons' testimony. Riisager's false testimony about Respondent's Christmas party, set forth below, casts serious doubt on his other testimony.

On or about November 24, Irvine had a conversation with Anderson in which Irvine questioned why he was driving a water truck instead of operating a bulldozer. Irvine told Anderson about his job experience. Anderson said he would speak with Simons. The next day, Irvine asked whether Anderson had spoken to Simons. Anderson reported that Simons wanted Irvine to drive the water truck because Irvine was doing a good job.

Riisager testified that at Respondent's Christmas party he overheard Anderson say to Simons "it looks like that rock truck thing worked." Riisager unequivocally stated that he was sitting next to Simons when Anderson entered and made the alleged statement. I do not credit Riisager on this point. Simons was not at the Christmas party. There was only one Christmas party and at the time of that party, Simons was on vacation in New Mexico. Documentary and credible testimonial evidence establish that Simons was in New Mexico at the time. Riisager's testimony was clear as to the time and place of this conversation. Thus, I cannot find that the conversation occurred at another time or place. Rather, I find that Riisager fabricated this testimony.

Riisager testified that in December, Simons asked if a certain employee-applicant had worked for a union employer. When told that the employee had worked for the company, Simons told Riisager that he did not believe that he could not hire the employee because the employee had been a member of the Union. However, Riisager also testified that Simons told Riisager to have the employee call him. Simons gave Riisager permission to give the employee his home phone number and told Riisager to have the employee call Simons. Riisager asked if Simons got in trouble for hiring Irvine and Simons answered that he had. Respondent's memorandum of March 1 admits that Simons asked an employee if a certain employee was union

² Riisager testified that he overheard Simons state that he had observed the stickers on Irvine's lunchbox. For the reasons stated below, I do not credit Riisager's testimony.

affiliated.” I find that Simons questioned whether the employee applicant was affiliated with the Union but that Simons did not say that he could not hire the employee.

As a bulldozer operator, Irvine earned \$35.70 per hour (including benefits). As a water truckdriver, Irvine earned \$26 an hour including benefits. Irvine was paid more than he had received on prior nonsupervisory jobs. General Counsel contends that this significant loss of pay was designed to cause, and did cause, Irvine to resign his employment. On or about December 20, Irvine received an offer of employment which paid him \$25 an hour but also promised him 10 hours a week of overtime. Since this job offered more compensation than driving the water truck for Respondent, Irvine resigned from Respondent on December 23, 1998.

Rollins was hired by Simons to work as an equipment operator. On or about November 18, Simons reassigned Rollins to drive a rock truck. Prior to that assignment, Rollins had driven a rock truck about one third of the time. As an equipment operator, Rollins received \$35.70 per hour including benefits. As a rock truckdriver, Rollins earned \$25.88 including benefits. As a rock truckdriver, Rollins was earning more than he received at any of his previous jobs. Rollins was moved from different pieces of equipment more than most employees because other employees had performed better on each piece of equipment. Around November 10, Kenneth Hoover a superintendent, reported to Johnson that he saw that the person operating a blade was not operating the equipment properly. Johnson determined that the person was Rollins. Johnson gave this information to Simons. Simons immediately took Rollins off the blade. Rollins was assigned to grade checking for 2 days and then assigned to a rock truck. Simons and Anderson decided that Rollins was better on the rock truck than any other equipment he operated.

The General Counsel contends that after Rollins was assigned to the rock truck, Respondent assigned unqualified and inexperienced employees to operate equipment. Rollins testified that on January 4, he observed an employee improperly operating a hoe ram. Rollins informed Anderson that the employee was not qualified. According to Rollins, Anderson simply answered that the employee had told Respondent that he could operate the equipment. Two days later, Anderson and Simons needed someone to operate a rubber tire backhoe. According to Rollins, Anderson and Simons ignored Rollins while asking almost all the employees if they could perform the work. Rollins assumed that the supervisors knew that he could operate the equipment but did not volunteer for the assignment. Ultimately, the same employee that Rollins had observed operating a hoe ram incorrectly, was assigned the work.

On January 8, Rollins called Simons and terminated his employment with Respondent. Rollins testified that he quit because of “the money” and because of a safety issue. I do not credit Rollins testimony that he quit because of the money, because he was earning more as a truckdriver for Respondent than he earned in any of his prior jobs.

On February 1, the Union notified Respondent that Riisager was an “inside organizer.” That same date, Simons asked Riisager if he really was in the Union. Riisager and Simons had a problem with moneys withheld from the checks with a previous employer. Simons asked Riisager if the Union was paying back the money owed to Riisager.

On February 5, 1999, Riisager provided an affidavit to the board in connection with the charge concerning Rollins and

Irvine. On February 10, Respondent became aware of the allegations against Simons. On February 16, Simons admitted to Johnson that he had discussed the Union with Riisager. Johnson reminded Simons of the labor relations training he had received and told Riisager that he was to remain silent about union issues. On or about February 22, Simons told Riisager that he didn’t want to talk with Riisager because Riisager had gotten him in trouble. This was an apparent reference to Simons’ questioning of Riisager.

On March 1, Johnson issued a written warning to Simons. Johnson reminded Simons that the supervisor had been instructed to keep silent about union issues and to specifically avoid asking employees anything about union activities. Johnson further wrote that any further such conduct would result in termination of employment. Also, on March 1, Johnson issued a memorandum to employees which stated as follows:

We have had a series of unfair labor practice charges filed against us by Operating Engineers Union Local 12. We believe none of the charges have merit and we have been in the process of providing facts and information to the National Labor Relations Board to defend against the charges.

However, in the most recent charge filed, certain allegations were made that one of our supervisors, Jay Simons, said things that could arguably constitute unfair labor practices.

Jay Simons has been in supervisory training sessions in which he and all supervisors have been instructed not to say anything to employees about the union and/or union employees. It is this company’s position, and it has always been this company’s position, to not discriminate based upon union backgrounds or affiliation, not to interrogate employees about their union affiliation, and not to imply that union employees would be penalized in any way, shape or form, based upon their union affiliation. No supervisor of Meadow Valley is authorized to say or do otherwise and all Meadow Valley supervisors have been trained and instructed not to do otherwise.

Mr. Simons has admitted violating those instructions and in the process has said some things to certain employees that may be construed as unfair labor practices. Specifically, Mr. Simons asked an employee if the union paid them anything for being an organizer, asked an employee if a certain person was union-affiliated, asked if an employee (who Mr. Simons thought was a close friend) if he was in the union, why he had not told Mr. Simons before, and why the union had sent the company a letter about him. In accordance with our legal duty to do so, we hereby renounce, repudiate, and rescind, all of these comments and anything else that Mr. Simons may have said to any employee about union interrogation, union affiliation, or union background. Appropriate discipline of Mr. Simons in the form of a written final warning, has been issued. The recent unfair labor practice alleged that Mr. Simons said other things but he has denied them.

We wish to reassure all employees that neither their union affiliation nor union background will have any influence, one way or the other, upon work assignments, upon hiring practices, or upon continued employment with Meadow Valley. We renounce and repudiate any comment that may be made by any supervisor in the future that is inconsistent with these assurances. Meadow Valley is

interested only in an employee's willingness and ability to work for the pay provided. We want to assure all employees that Meadow Valley does not retaliate against anyone for being either for or against unionization.

After Respondent was notified that Riisager was a union organizer, Riisager asked Anderson about continued employment. Anderson told Riisager that he did not care about Riisager's union activities. Anderson told Riisager that he had no problem with him and that Riisager could stay for 20 years.

On or about March 13, Respondent laid off approximately eight employees. Further layoffs were necessary in April. On April 15, 1999, Simons informed Riisager that he was being laid off. Simons was one of five employees laid off that day. Riisager thanked Simons for the work and left. Three of the laid off employees were truckdrivers.

Respondent asserts that there was a "toss-up" between Cheston Cardova, another operator and Riisager as to who was going to be laid off. Simons argued for Riisager's retention but Anderson decided to keep Cardova because he had worked with Cardova in the past. On April 16 Cardova quit. Respondent chose not to recall Riisager but instead retained another operator named Larry Moore. The reason for retaining Moore was that he was still present and not officially laid off when Respondent learned of Cardova's resignation. On May 10 Roger Burright, another operator laid off with Riisager on April 15, was recalled to work. Burright was recalled at the request of a working foreman for a special assignment. Respondent normally does not recall employees from layoff but instead relies on new hires to fill vacancies. Respondent hired operators on May 10 and 17, and July 26, rather than recall Riisager.

Respondent contends that that Rollins and Irvine had been assigned to the rock truck and water truck prior to any knowledge of union activities on their part. Respondent also contends that Rollins was assigned to drive a truck because his performance as an operator was inadequate. Further, Simons, Johnson, and Anderson all hired or referred union members to work for Respondent. Finally, Respondent contends that it repudiated Simons' remarks to Riisager.

C. Conclusions

In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983). In *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), the Board restated the test as follows: the General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

The two elements necessary to establish a constructive discharge are, first, that the burdens imposed on the employee

must cause a change in working conditions so difficult or unpleasant as to force an employee to resign, and second, that the burdens were imposed because of the employees' union activities. *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976); *Consec Security*, 325 NLRB 453 71 (1998). A significant reduction in income for an indefinite period of time, causing an employee to quit and seek alternative employment, when a motive for such treatment was protected activity will establish constructive discharge. *T&W Fashions*, 291 NLRB 137, 142 (1988); *Trumbull Industries*, 314 NLRB 360, 365 (1994); *Consec Security*, supra.

For the following reasons, I find that the General Counsel has made a weak prima facie showing that Respondent was motivated by unlawful considerations in assigning Irvine to drive a water truck. First, the only evidence of knowledge of Irvine's union activities is that on October 19, Irvine began wearing union insigna. Irvine wore a union sticker on his hard hat and a union T-shirt. Irvine also had a union sticker on his lunchbox. However, there is only circumstantial evidence that Respondent was aware of Irvine's union paraphernalia. The timing of the assignment coincides with wearing of the union articles but more importantly coincides with the fact that the bulldozer Irvine was working on broke down on October 20. Therefore, on October 21, Irvine was reassigned to a water truck. After Irvine was designated an inside organizer by the Union, Irvine was reassigned to a larger water truck. Irvine received a slight wage increase with this reassignment. The only evidence of animus is Simons' conversation with Riisager wherein Simons asked whether the Union paid its organizers. That conversation took place after Irvine was assigned to a water truck. Further, the animus doesn't appear strong enough to show that Respondent would violate the law to retaliate against a union supporter. Simons knew that there were union members on the job and had hired union members.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of Irvine's union activities. Respondent has shown legitimate business reasons for assigning Irvine to a water truck. First, Irvine's bulldozer broke down the day before he was assigned to the water truck. Second, Irvine had the appropriate driver's license to operate the water truck. Third, Irvine did a good job on the water truck. Fourth, all these events took place prior to notification that Irvine was an organizer for the Union.

Thus, I find that the weak prima facie case is rebutted by the evidence that lawful reasons for Irvine's reassignment existed. I find Respondent has shown that Irvine would have been reassigned in the absence of his union and protected concerted activities. Thus, I find that Respondent has not violated Section 8(a)(3) and (1) of the Act.

Respondent's records show that prior to receipt of the letter designating Rollins as a union organizer, Rollins had worked more than one third of his time driving a rock truck. Simons testified that he had moved employees to different pieces of equipment to see where they worked. Rollins was moved more than most employees because other employees had performed better on each piece of equipment. Around November 10, Kenneth Hoover a superintendent, reported to Johnson that he saw that the person operating a blade was not operating the equipment properly. Johnson determined that the person was Rollins. Johnson gave this information to Simons. Simons immediately took Rollins off the blade. Rollins was assigned to grade checking for 2 days and then assigned to a rock truck.

Simons and Anderson decided that Rollins was better on the rock truck than any other equipment he operated.

Again, the General Counsel has at best a weak prima facie case. Rollins was assigned to the rock truck 2 days after the Respondent received a letter designating him as an organizer. However, prior to receipt of that letter Hoover had reported that Rollins was not operating a blade properly. Johnson relayed this information to Simons who immediately took Rollins off that equipment. Rollins was assigned to a rock truck 2 days later, an assignment he had performed more than one third of his time on the jobsite.

The only evidence of animus is that Simons questioned Riisager whether the Union paid its organizers. This evidence is not strong enough to support an inference that Respondent re-assigned Rollins because of his union activities. This is particularly true where as here Respondent had legitimate business reasons for assigning Rollins to the rock truck.

As stated above, to support a constructive discharge, the burdens imposed on the employee must cause a change in working conditions so difficult or unpleasant as to force an employee to resign. In *Algreco Sportswear Co.*, 271 NLRB 499, 500 (1984), the employer instituted a three-tier wage plan and put six employees in the lowest wage group because of their protected activity. One of the employees quit. The Board held that the wage assignment was discriminatory, but not so intolerable as to force the employee to quit. Similarly, in *KRI Constructors, Inc.*, 290 NLRB 802 (1988), an employer paid union supporters \$1.90 an hour less than nonunion employees. The lower pay was found to be discriminatory but not so difficult and unpleasant to force the employees to quit.

In the instant case, Irvine and Rollins were being paid under prevailing wage conditions. Although they were paid less than equipment operators, they were well paid. Rollins was earning more than he had received with his previous employers. Irvine was paid more than he had received on prior nonsupervisory jobs. Assignment to these jobs would not reasonably be expected to cause these employees to quit. Further the conditions could not reasonably be characterized as so difficult and unpleasant as to force the employees to quit.

The General Counsel concedes that Respondent had lawful reasons for a reduction in force in April 1999. However, the General Counsel contends that Riisager was included in the layoff because Riisager gave testimony in the form of an affidavit in Case 28-CA-15775.³ Riisager gave an affidavit to the Board on February 5, 1999. Shortly thereafter, Simons said he would not talk to Riisager because Simons had gotten into trouble for talking to Riisager about the Union. On February 16, Simons admitted to Johnson that he had discussed the Union with Riisager. Johnson reminded Simons of the labor relations training he had received and told Riisager that he was to remain silent about union issues. On March 1, Johnson issued a written warning to Simons and a memorandum to employees repudiating Simons' remarks to Riisager.

Respondent laid off seven employees between March 11 and 22. Moreover, when Respondent did lay off Riisager in April, Simons argued against including Riisager in the layoff. Anderson chose another employee over Riisager because Anderson was more familiar with the other employee. Anderson did not

have animus against Riisager. After Respondent was notified that Riisager was a union organizer, Riisager asked Anderson about continued employment. Anderson told Riisager that he did not care about Riisager's union activities.

Simons did question Riisager, a longtime friend, about the Union after Riisager was designated a union organizer. However, Respondent repudiated those remarks when it found out about them.

It has long been held that there are five principal elements that constitute a prima facie case insofar as Section 8(a)(3) and (1) are concerned. The first is that the employee alleged to be unlawfully disciplined must have engaged in union or protected activities. The second is that the employer knew about those protected activities. Third, there must be evidence that the employer harbored animus against those individuals because of such activities. Fourth, the employer must discriminate in terms of employment. Finally, the discipline must usually be connected to the protected activity in terms of timing. See, e.g., *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993).

The evidence shows that Respondent knew that Riisager gave an affidavit or otherwise gave testimony to the Board. It was a conversion between Riisager and Simons that Respondent attempted to repudiate. Further, Respondent received a letter from the Union designating Riisager a union organizer. There is no evidence that Respondent harbored animus against Riisager for this conduct. An economic layoff was necessary. Simons argued against laying off Riisager. Anderson had previously assured Riisager that the employees' union activities would not be held against him. I cannot find that Respondent acted unlawfully in laying off Riisager in April 1999.

The Respondent did not thereafter recall Riisager from lay-off. The evidence shows that Respondent did not generally recall employees. Rather the Company generally hires from new applicants. One employee was recalled pursuant to the request of a working foreman. While the failure to recall Riisager may appear suspicious, there is insufficient evidence to find that Respondent discriminated against him because of his union activities or because he gave testimony under the Act.

As indicated above, Simons admitted that he asked Riisager if the Union paid employees to organize, if an employee-applicant was affiliated with the Union, if Riisager was in the Union, why the Union had sent Respondent a letter about Riisager, and why Riisager had not told Simons before. However, on March 1, Respondent attempted to repudiate this conduct.

In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board held that an employer may relieve itself of liability for unlawful conduct by repudiating the conduct. To be effective such repudiation must be "timely," "unambiguous" "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." Furthermore, there must be adequate publication to the employees involved and there must be no proscribed conduct after the publication. Finally, such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights.

I find that Johnson's March 1 memorandum meets the *Passavant* requirements. The critical issue is whether there have been any further violations of the Act since the repudiation. As indicated above, I find that Respondent did not violate the Act after the March 1 memorandum.

³ The General Counsel listed the wrong case number. The affidavit at issue was given on February 5, 1999, but Case 28-CA-15775 was not filed until April 19, 1999, 4 days after Riisager's layoff.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. It has not been established that Respondent has violated Section 8(a)(3) and (1) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁴

⁴ All motions inconsistent with this recommended order are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the

ORDER

IT IS HEREBY ORDERED that the complaint be, and it is, dismissed in its entirety.

Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.